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# How to Protect Your Assets and Family Using Trusts

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# What is a Trust?

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- A trust is a written agreement between you and your trustee in which the trustee agrees to hold your assets according to certain terms. It is essentially a legal entity that owns property for a specific purpose.
- To create a Trust, you need:
  - Grantor
  - Trustee
  - Beneficiary
  - Property
  - Agreement
- A trust can be revocable or irrevocable

# How Trusts Can Provide Protection

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1. Simplify administration of your estate upon your death and help you avoid probate
2. Protect assets from estate and gift tax
3. Protect assets from creditors, lawsuits, or future divorce
4. Protect assets from the costs of long-term care in the future



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# Using Trusts to Avoid Probate and Simplify Estate Administration

# Probate, Explained

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- “Probate” is the process in which your named Executor brings your last will and testament to Court and asks the Court to validate your Will and formally appoint your Executor as the person authorized to administer your Estate
- Your Executor will then have the needed proof that he/she is authorized to collect and distribute the assets of your estate
- If you die owning property in your individual name (and no beneficiary is named), no one will be authorized to collect that property when you die
- For example, if the deed to your residence is in your name only and you die, no one is authorized to sell it. The Executor named in your Will (in some states called a Personal Representative) cannot simply bring your Will to the real estate closing to sell your property

# Probate, Explained

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- The steps include:
  - File a probate proceeding with the Surrogate’s Court with your original Will
  - Obtain jurisdiction over all “interested parties” by getting their consent to probate or serving them with a citation to appear in court
  - If your Family Tree is complicated or there are any issues with your Will, there will be additional evidence required for probate
  - If the Court is satisfied that the filed Will is your last will and testament, it will admit your Will to probate and appoint your Executor

# Why Avoid Probate?

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- Your Will and certain information about estate assets and family will become public record
- Creditors review probate records and now have the opportunity to look to your estate for payment
- The “interested parties” whose consent is needed may include an estranged spouse, child, sibling, or other unhappy family member, who are now formally notified they can contest your Will. Your estate assets will cover your Executor’s costs in defending your Will in probate, and a contest can be very expensive
- The probate process can take several months depending on your state and county or, if contested, even years
- In the meantime, your family will need to wait to collect your property and sell your residence, and will need to continue to pay the ongoing carrying costs of your residence while they wait

# Avoiding Probate Using a Trust

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- Properly funded Trusts can allow you to avoid the probate process (with certain exceptions)
- Assets owned by your Trust can pass to your beneficiaries upon your death without any need for court involvement
- Your Trustee can access accounts and sell real property owned by the Trust as soon as your death certificate is available
- Beneficiary designations and joint accounts are also instrumental in avoiding probate



# Using a Revocable Trust to Avoid Probate

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- Your Revocable Trust can own your property during your lifetime. You will still have access and control over your assets as the Trustee, and can change or revoke your Trust as you wish
- A Revocable Trust can be used in lieu of a typical Will to direct how property passes at your death
- It reduces chance of dispute between family members
- If trusts will continue for your beneficiaries after your death, a Revocable Trust avoids the need for court supervision over continuing trusts
- In sum, using a Revocable Trust can save your loved ones time, money, and stress after you pass away



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# Using Trusts to Shelter Assets from Estate and Gift Tax

# Estate Tax Basics

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- Estate tax is a tax on the transfer of property at your death
- Gift tax is a tax on transfer of property during lifetime
- Assets pass between spouses free of gift and estate taxes
- Assets passing to others are subject to gift or estate tax once you exceed the Federal lifetime exemption of \$12,920,000 (for 2023). This amount is set to be reduced by approximately half on January 1, 2026
- The Federal estate tax rate on amounts in excess of exemption is 40%
- Your state may also have an estate tax (New York and Connecticut do; Florida and New Jersey do not, but New Jersey does have an inheritance tax for certain beneficiaries)
- In New York, if your estate exceeds New York's exemption (currently \$6,580,000) by a small amount, there is no exemption at all and the entire estate, not just the excess, is taxed. New York's top tax rate is 16%.

# Irrevocable Trusts for Reducing Gift and Estate Tax

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- You can use an Irrevocable Trust to shelter assets from gift and estate tax
- Remove assets and their future appreciation from your taxable estate
- You cannot be a beneficiary or a Trustee
- Transfer must be irrevocable
- You are giving up control and enjoyment of assets
- Your spouse or children can be beneficiaries

# Irrevocable Life Insurance Trust (ILIT)

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- Life insurance proceeds are not exempt from estate tax
- You can create an Irrevocable Life Insurance Trust to prevent your life insurance proceeds from being taxed
- You must transfer ownership of your life insurance policy to the Trust
- You must live three years from gift to qualify for estate tax exemption
- Premium payments once ownership is transferred are considered taxable gifts
- You can use your annual gift tax exclusion of \$17,000 per recipient per year (\$34,000 for married couples)

# Spousal Lifetime Access Trust (SLAT)

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- You can set up a Spousal Lifetime Access Trust for your spouse and/or your children's benefit and add up to the Federal exemption amount (\$12,920,000) without paying Federal gift tax
- Your spouse can be a Trustee and access/use SLAT funds if desired
- Even though you cannot access directly, you can enjoy the funds indirectly through your spouse
- Once property is in the SLAT, all future appreciation is exempt from tax in your estate
- If you pay the income taxes on Trust assets ("grantor trust"), the Trust can grow even more.

# Annual Exclusion Trust

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- You can give \$17,000 per year to as many people as you like (\$34,000 if you are married)
- These are called “annual exclusion gifts”
- Annual exclusion gifts do not use up the lifetime Federal \$12,920,000 exemption.
- To reduce your taxable estate, you can create an Annual Exclusion Trust for your beneficiaries to make use of this exclusion year over year without giving assets directly to beneficiaries

# Other Irrevocable Trusts to Consider for Estate Tax Planning

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- Qualified Personal Residence Trust
- Grantor Retained Annuity Trust
- Intentionally Defective Grantor Trusts
- Charitable Trusts
- Credit Shelter Trust





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# Protect Assets from Creditors, Lawsuit or Future Divorce

# Protection from Creditors, Lawsuit, or Future Divorce

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- Asset Protection Trusts can protect assets from creditors, lawsuits, malpractice claims, or divorce
- Is essential to plan early... before any claims are suspected or asserted
- Law does not permit transfer of assets that renders you insolvent in “fraud” of your creditors
- No 100% guarantee of asset protection, but various factors can increase the strength of your plan

# Features of an Asset Protection Trust

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- To protect assets from creditors, transfers must be irrevocable
- “Independent” Trustee must have complete discretion regarding distributions
- Select an independent person or a bank or trust company to act as Trustee
- Creator of Trust cannot serve as Trustee
- Create Trust in a jurisdiction with favorable asset protection laws – some states allow “self-settled” asset protection trusts
- Make transfers as part of estate plan for estate tax and family wealth transfer planning reasons when no creditors exist

# Features of an Asset Protection Trust (cont'd)

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- Some states such as Nevada and Alaska have laws to discourage creditors. Laws vary in protections
- Creator of Trust can be a potential beneficiary and have other powers over Trustee—but less “strings” the better
- Requires Trustee in other jurisdiction (commissions and investment fees of several thousand dollars annually)
- Practical minimums - \$1,000,000 or more for domestic, more for foreign trusts
- Creditor has additional expense of obtaining legal counsel in other jurisdiction to fight Trust
- Exempt in bankruptcy

# Trusts and Divorce

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- Irrevocable Trusts can potentially protect assets in case of future divorce
- If you are a beneficiary of a trust and have a right to income or principal distributions (e.g., for your “maintenance and support”), that interest is vulnerable in divorce
- Having an independent Trustee who can refuse your requests is the best way to provide protection
- If Trust is for the benefit of your children and you are not a beneficiary, less likely to be reached
- Divorce settlement is “equitable” in many states and court may be able to find other ways to make up for hard to reach trust assets
- Trusts created in some jurisdictions allow you to have a beneficial interest and make it more difficult for your spouse to attack your interests in the trust

# Other Strategies to Consider for Asset Protection

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- Malpractice insurance (settlements rarely exceed malpractice coverage)
- Qualified retirement assets such as 401(k) and IRA are inherently creditor protected and should not be transferred to a Trust
- Make sure you or a vulnerable beneficiary does not inherit assets outright
- Prenuptial and Postnuptial agreements



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# Protect Assets from the Costs of Long-Term Care

# Protecting Assets from Costs of Long-Term Care

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- For many, how home care or nursing home care will be paid for later in life is a concern
- Because long-term care can be exorbitantly expensive and most private health insurance plans do not cover it, many seek to shelter assets in order to later qualify for Medicaid
- Medicaid is a government health insurance program that covers the cost of home care and nursing home care
- Needs-based program
- Eligibility criteria vary by state, but individuals can only have nominal resources in their name in order to qualify
- Many states have a “5-year lookback” period for chronic care Medicaid programs. You must provide 5 years of financial records to prove that no transfers were made to attain eligibility within that timeframe



# Features of a Medicaid Asset Protection Trust

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- Assets owned by a “Medicaid Asset Protection Trust” are not considered resources on a Medicaid application after being owned by the Trust for the lookback period
- Medicaid Asset Protection Trust must be Irrevocable
- You cannot be allowed to receive any principal distributions whatsoever
- You may receive income generated by the Trust assets
- You should not serve as a Trustee, but you can retain the right to remove and replace a Trustee which allows some indirect control
- If the Medicaid Asset Protection Trust owns your residence, you may retain the exclusive right to reside there
- You may also retain the right to direct how the Trust property is distributed at your death
- Assets in a Medicaid Asset Protection Trust are included in your taxable estate



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# Other Considerations for Trusts

# Protecting Beneficiaries

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- Upon your death, you can pass assets to your beneficiaries outright or in further Trust, until a certain age, or for life.
- Continuing Trusts can offer protection for your beneficiaries from creditors and estranged spouses can save estate taxes upon his/her death
- Continuing Trusts can also be drafted to protect the assets for spendthrift beneficiaries, beneficiaries with substance abuse issues, beneficiaries in troubled marriages
- Continuing Trusts also ensure assets remain in the family after beneficiary's death
- Supplemental needs trust provisions can preserve eligibility for government benefits for beneficiaries with special needs
- No additional Trust agreement is needed – you can include these continuing trust provisions in your Revocable Trust or Irrevocable Trust

# Ensure your Trust “Works”

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- Your Trust must be properly funded
  - Make sure that the property you intend to put into the trust is transferred to the trust
  - Check those account titles or current deeds to see that the assets are in the Trust name
- Your Trust’s terms must be followed to be respected
  - Make sure you and your Trustee understands the rules
  - Communicate with your attorney if you are unsure about any action you are taking with respect to your Trust
- Coordinate with your accountant to make sure transfers to your Trust are reported properly
- Make sure your beneficiary designations are in order with your estate plan, as they can override the terms of your Will or Trust



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**QUESTIONS?**

# Doris L. Martin

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Doris (“Dede”) L. Martin heads the Trusts, Estates, and Private Client Services Group. Dede advises clients on estate planning, administration, and litigation, charitable giving, elder law, tax-exempt organizations, and qualified retirement plans.

Since joining the firm in 1994, Dede’s practice has encompassed all aspects of estate planning, including wills, revocable trusts, charitable trusts, insurance trusts, qualified personal residence trusts, grantor retained annuity trusts, family limited partnerships, retirement plans, and asset protection; all aspects of estate and trust administration, including probate post-mortem planning, and estate tax returns; Medicaid and elder law planning, and the establishment and operation of tax-exempt organizations for individual clients and tax-exempt organizations. She also works with families of special needs individuals, establishing Supplemental Needs Trusts and advising families on Medicaid matters and other governmental benefits. She also has represented organizations devoted to working with special needs children.

Dede has particular experience in estate planning for physicians. Dede frequently writes and lectures on estate planning.

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Kristen M. Walsh concentrates her practice on complex estate planning, asset protection and wealth preservation, trust and estate administration, and elder law.

Kristen designs and implements estate plans that are specifically tailored for the needs and objectives of each of her clients. She drafts estate planning documents from the simple to the complex, including wills, revocable and irrevocable trusts, family agreements, and advance directives. Kristen's estate plans address estate and gift tax planning, elder care and special needs concerns, business succession planning, and lifetime and charitable giving.

In trust and estate administration matters, Kristen is involved in the preparation of gift and estate tax returns and the preparation of both informal and formal accountings. She advises executors and trustees on their fiduciary duties and advises beneficiaries on their rights. Kristen also represents clients in both contested and uncontested Surrogate's Court matters, including probate, administration, and accounting proceedings, and other trust and estate litigation matters.



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